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In The

Supreme Court of the United States

October Term, 1997

LOS ANGELES POLICE DEPARTMENT, CITY OF LOS ANGELES, OFFICER JANE DOE RODRIGUEZ, SERGEANT JOHN DOE MONTELONGO and CHIEF WILLIE WILLIAMS,

Petitioners,

vs.

HARRY NMI PERRY and ROBERT "JINGLES" NEWMAN,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

JAMES H. FOSBINDER
Counsel of Record
RHONDA M. FOSBINDER
FOSBINDER & FOSBINDER
Attorneys for Respondents
723 Ocean Front Walk
Venice, California 90291
(310) 396-1071
(310) 285-3019

144907

(800) 274-3321 • (800) 359-6859
A DIVISION OF COUNSEL PRESS

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QUESTIONS PRESENTED FOR REVIEW

Whether the Equal Protection Clause prohibits the City of Los Angeles from requiring membership in a city licensed "charitable" or "non-profit" organization in order for an individual to be allowed to fully exercise one's First Amendment rights under the United States Constitution (hereinafter "First Amendment") in a traditional public forum.

Whether city licensed non-profit organizations have "greater" First Amendment protection than individuals when engaging in protected expressive activities.

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SUMMARY OF ARGUMENT

Respondents Harry Perry and Robert Jingles Newman respectfully request this Court to deny the Petition for Writ of Certiorari seeking review of the opinion of the Ninth Circuit Court of Appeal.

The writ should be denied because (1) there is no conflict of law amongst the appellate courts, or between the Ninth Circuit and this or any other court, or amongst the Ninth Circuit decisions themselves, on the issues presented by this matter; (2) the Ninth Circuit properly states and applies the relevant rules of law; and (3) the petitioners are improperly seeking as, advisory opinion from this Court on how to draft its ordinances, which is not a matter within the jurisdiction of this Court.

STATEMENT OF THE CASE

The issue in this case centers on the constitutionality of an ordinance enacted by the City of Los Angeles which bans the sale of merchandise and the solicitation of donations on public beachfront land, but *exempts* the solicitation of donations and the sale of merchandise "constituting, carrying, or making a religious, political, philosophical or ideological message or statement relevant to the purpose of said non-profit organization" by city licensed non-profit organizations. *Los Angeles Municipal Code* § 42.15 (1991) [Petition, pp. 4-5, 31g]. In striking the ordinance, the Ninth Circuit held that the ordinance was facially unconstitutional and overbroad because there was no basis for allowing the exercise of First Amendment protected rights by licensed non-profit organizations, while prohibiting the exercise of those rights by individuals not belonging to non-profit organizations.

In the period preceding the filing of the action in the district court, individuals engaging in religious, political, and artistic

activities, including Respondents, were ticketed and threatened with arrest and jail if they accepted donations or if they took money in exchange for protected articles bearing such individual's message, if the person could not demonstrate to the City that they belonged to a licensed non-profit organization. Under the ordinance, for example, if an individual wants to test the waters for a run for Congress by going down to the Venice Boardwalk to campaign, he or she will be arrested for violating the City's ordinance if the person raises even a small amount of money by asking for campaign contributions, or for selling CD-ROMs giving his or her life history and detailed proposals, unless they first created a non-profit organization.

After the district court issued its initial Temporary Restraining Order on May 8, 1995, a preliminary injunction was entered on July 3, 1995, which was and has been the basis for successful management of the ocean side of the Venice Boardwalk ever since[1].

In modifying the Temporary Restraining Order to create the terms of the preliminary injunction, the City of Los Angeles was specifically *not* enjoined from "enforcing, Los Angeles Municipal Code Section 42.15 against individuals *or* nonprofit organizations selling *commercial* items such as, but not limited to, foodstuffs, including but not limited to ice cream, hot dogs, churros, pastries, fruit or soda . . . or any other consumer good which does not have a constitutionally protected message

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1. Notably, neither the district court's Memorandum of Decision, entered on July 3, 1995, granting a preliminary injunction on behalf of the plaintiffs, nor the preliminary injunction itself, is mentioned in the City's Petition, nor included in the Appendix thereto. Because it reaches essentially the same conclusions as the opinion rendered by the Ninth Circuit, however, it is not necessary to an understanding of the judgment sought to be reviewed and the decision is therefore not reproduced herein.

inextricably intertwined with the product", to aid the City in distinguishing protected from non-protected activities.

The status quo with respect to allowing non-commercial vendors engaged in expressive activities on the Venice Boardwalk to occupy the western, ocean side of the walkway, while prohibiting commercial vending, was thus successfully preserved all summer long, as it is to this date.

On February 20, 1996, however, after presentation of plaintiffs' evidence at a bench trial in this action, the City of Los Angeles moved for a judgment dismissing the action on partial findings pursuant to Fed. R. Civ. Proc. § 50. The court below granted the request, basing its decision solely on the Ninth Circuit's ruling in *One World One Family Now v. City and County of Honolulu,* 76 F.3d 1009 (9th Cir. 1996), in which an "as applied" challenge to a ban on the sale of message bearing T-Shirts by non-profit organizations on a main city street in Waikiki was rejected.

The Ninth Circuit Court of Appeals reversed, holding that unlike the ordinance in *One World,* the Los Angeles ordinance was not narrowly tailored because it discriminated against a substantial quantity of speech based solely on the identity of the speaker, *i.e.* protected, expressive speech by individuals not affiliated with any non-profit organization, a distinction which was unwarranted to protect the government's interests and to remedy the evil the City was seeking to protect against, rampant commercial activity on the Boardwalk. Thus, the ordinance is overbroad "because it prohibits not only purely commercial activities, but also protected expressive activities, like those of plaintiffs here." *Perry v. Los Angeles Police Department,* 121 F.3d 1365, 1371 (9th Cir. 1997).

REASONS FOR DENYING THE WRIT

I.

THE DECISION BY THE NINTH CIRCUIT PROPERLY STATES AND APPLIES THE APPLICABLE RULES OF LAW SET FORTH BY THIS COURT AND BY PRIOR NINTH CIRCUIT DECISIONS.

A. The Decision Below Is Consistent With This Court's Rulings.

In its Petition for Writ of Certiorari, the City of Los Angeles, *et al.* (hereinafter, "the City") argues that the decision here sought to be reviewed conflicts with the Ninth Circuit's earlier decisions in *One World One Family Now v. City and County of Honolulu*, 76 F.2d 1009 (9th Cir. 1996) and *Gaudiya Vaishnaya Society v. San Francsico*, 900 F.2d 1369 (9th Cir. 1990), *amended*, 952 F.2d 1059 (9th Cir. 1991), and with this Court's decisions in *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 109 S. Ct. 3028, 106 L. Ed. 2d 388 (1989) and *Riley v. National Federation of the Blind*, 487 U.S. 781, 108 S. Ct. 2667, 101 L. Ed. 2d 669 (1988). Nothing could be further from the truth. In fact, the Ninth Circuit's decision in the instant matter is not only consistent with all of these decisions, as well as with other decisions rendered by this Court, but is supported by them as well.

The "problem" that the City complains of arises not from any conflict of law, but from the City's misunderstanding of the law, as evidenced by the following "conclusion" set forth by the City: "Thus, speech by non-profit organizations is *differentiated* and given *higher constitutional freedom of speech treatment* than other types of speech." [Petition, p. 14 (emphasis added)]. This statement, which summarizes the City's entire

argument, is fallacious, and the Equal Protection Clause mandates that the discrimination between the exercise of First Amendment rights by non-profit organizations and individuals is patently unconstitutional. As correctly observed by the Ninth Circuit:

> This type of speaker-based discrimination is unacceptable. In *Schaumberg*, the [Supreme] Court found that the solicitation of charitable donations could not be regulated by a distinction based on *who* was doing the soliciting. The [Supreme] Court has also noted that "government regulation may not favor one speaker over another." *Rosenberger v. Rector and Visitors of the University of Virginia*, 115 S. Ct. 2510, 2516 (1995). The government's argument that prohibition of expressive speech can turn on a person's membership in a non-profit organization fails.
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> * * *
>
> There is simply no authority limiting the right to seek charitable donations or to sell expressive items to those with memberships in non-profit organizations. No other First Amendment rights are restricted in such a manner. Once it is decided that the activity here is expressive activity, fully protected by the First Amendment, the fact that plaintiffs are not nonprofit organizations does not affect the level of protection accorded to their speech.

Perry v. Los Angeles Police Department, 121 F.3d 1365, 1371 (9th Cir. 1997) [Petition, p. 15a]; *see also, Carey v. Brown*, 447 U.S. 455, 100 S. Ct. 2286, 65 L. Ed. 2d 263 (1980) (ordinance discriminating amongst types of picketers not

narrowly tailored); *City of Cincinnati v. Discovery Network*, 507 U.S. 410, 113 S. Ct. 1505, 123 L. Ed. 2d 99 (1993) (ordinance discriminating between newsracks for newspapers and newsracks for commercial handbills not narrowly tailored); *Village of Shaumberg v. Citizens for a Better Environment*, 444 U.S. 620, 100 S. Ct. 826, 63 L. Ed. 2d 73 (1980) (ordinance discriminating between charitable organizations based on the amount of their receipts used for charitable purposes not narrowly tailored to serve governmental interest in limiting total number of door to door solicitations).

The City's sole support for its conclusion that it may discriminate in favor of non-profit organizations, offered without explanation, is this Court's decisions in *Board of Trustees of the State Univ. of New York v. Fox, supra,* and *Riley v. National Federation of the Blind, supra.* [Petition, p. 16]. However, neither of those decisions supports the idea that protected speech by non-profits may be differentiated from and offered greater protection than protected speech by individuals without running afoul of the Equal Protection Clause.

In *Riley,* in response to a challenge by a "coalition of professional fund-raisers, charitable organizations, and potential charitable donors", *Fox, supra,* 487 U.S. at 787, this Court held that various provisions contained in North Carolina's Charitable Solicitations Act licensing fund-raisers were unconstitutional and not narrowly tailored to the state's interest in preventing fraud.

In so holding, the Court ruled that contrary to the state's position that it had an overriding governmental interest in regulating the charitable solicitations of non-profit organizations, charitable fund-raising constituted *equally* protected First Amendment speech. In ruling that non-profit charitable solicitations may not be more burdened than other types of

protected speech, and is thus equally protected speech, this Court certainly did not suggest that such speech by non-profits was *more* protected than any other type of speech. *Id.*

In *Fox*, unlike in *Riley*, the issue before the Court was the prohibition by the State University of New York (SUNY) of the operation of private *commercial* enterprises in SUNY facilities. Because the factual situation was vastly different than in the instant case, the *Fox* decision is only tangentially related to the instant action. In *Fox*, a group of students alleged that in prohibiting "tupperware parties" in their dormitories, SUNY was infringing upon their First Amendment rights.

In ruling that the housewares parties sought to be held by the students constituted unprotected commercial speech, the Court discussed its holding in *Riley* concluding that fund-raising by charitable organizations is fully protected speech because the commercial aspects of the speech are inextricably intertwined with the non-commercial aspects of the speech. With respect to the housewares parties, that Court stated, "there is nothing 'inextricable' about the noncommercial aspects of these presentations." *Board of Trustees v. Fox*, 492 U.S. at 474.

The Court went on to discuss the allowable scope of government restrictions upon this commercial speech, discussions which have no relevance to the instant action, in which it is undisputed that all of the speech at issue is protected First Amendment activity. Once again, there is simply nothing in *Fox* to support the City's contention that speech by non-profit organizations is to be afforded any greater protection than any other non-commercial speech, regardless of the speaker.

B. The Decision Below Does Not Conflict With The Ninth Circuit's Earlier Holdings In *Gaudiya* And *One World One Family Now.*

The decision below is not only consistent with the Ninth Circuit's own decisions, but it is also entirely supported by the earlier decisions rather than contradicted by them.

In *Gaudiya,* for example, the Ninth Circuit recognized that the sale of merchandise by the plaintiff non-profit organizations constituted protected First Amendment activity, even though the merchandise being sold existed in the gray area between purely commercial speech and speech having no intrinsic purpose or value other than to communicate a message, because the merchandise and the message were inextricably intertwined. *Gaudiya Vaishnava Society v. San Francisco,* 952 F.2d 1059 (9th Cir. 1991). As pointed out by the Ninth Circuit in the instant decision, none of the reasoning in *Gaudiya* even revolved around the incidental fact that the plaintiffs were non-profit organizations rather than individuals. *Id.; see also Perry v. Los Angeles Police Department,* 121 F.3d at 1370 [Petition, p. 15a].

While it is true that in reaching its decision in *Gaudiya* the Ninth Circuit *necessarily* "relied on case law that accords First Amendment protection to fund-raising for charitable organizations", [Petition, p. 13], that decision simply does *not* say that non-profit organizations are to receive *greater* constitutional protection than others engaging in the same types of expressive activities. To the contrary, in fact, the need for the court to establish the basis for the First Amendment protection of the non-profits' activities *at all* suggests that there was some issue as to whether or not that type of speech was even protected, not that it was to receive *greater* protection. Thus, the *Gaudiya* decision is in no manner inconsistent with the instant decision.

In *One World One Family Now,* non-profit T-Shirt vendors who were attempting to sell articles of clothing bearing slogans and messages on a busy city street in the heart of Waikiki raised a very narrow "as applied" challenge to an ordinance which banned the sale of any types of merchandise except newspapers, but did allow handing out literature, proselytizing, or soliciting donations, amongst other things. *One World One Family Now v. City and County, of Honolulu,* 76 F.3d 1009, 1014 (9th Cir. 1996). The Ninth Circuit upheld the Honolulu ordinance in a 2-1 decision, holding that it was content-neutral and narrowly tailored as applied to those particular plaintiffs.

In so holding, the Ninth Circuit found that while the message bearing T-Shirts were undoubtedly First Amendment protected items[2], the Honolulu ordinance was valid because in instituting a flat ban on all sales, it did not require any exercise of discretion by government officials, was inherently content-neutral, and was narrowly tailored since it banned both

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2. Plaintiffs point out that T-Shirts themselves fall into a special category of expressive item in which the monetary value of the printed material is primarily in the medium (the article of clothing), and only incidentally in the message, unlike other items in which the article itself without the message has very little intrinsic value. An interpretation of the First Amendment saying that anything could be sold in a public forum as long as it had a message printed on it would undoubtedly result in the sale in public parks of "Save the Whales" refrigerators or "Newt Gingrich for President" bicycles. Respondents respectfully suggest that for items where the message is being conveyed on a medium that costs vastly more than its intrinsic value only because of the message being conveyed should be treated differently than items the value of which lies only incidentally in the message. Thus, such items as newspapers, bumper stickers, buttons, books and CD-ROMs, for example, have virtually no value without the speech contained in them, and are clearly purchased for the message they contain and not for the underlying medium.

commercial and non-commercial sales alike, and left open ample alternative channels of communication because it foreclosed one narrow form of expression — sidewalk sales of message bearing merchandise — but left the plaintiffs free to disseminate and seek support for their views by handing out literature, proselytizing or soliciting donations, for example. *One World One Family Now*, 79 F.3d at 1014.

Unlike the Honolulu ordinance, the Los Angeles ordinance is not a narrowly tailored ban, because it bans both the solicitations of donations and the sales of First Amendment protected materials by individuals, but not by registered non-profit organizations, and therefore discriminates against categories of speakers. It furthermore *does* vest discretion in government officials, because they can require, grant or deny non-profit licenses as a prior restraint on speech by individuals.

The Ninth Circuit states the distinction between the cases succinctly:

> [I]n *One World*, the restriction did not discriminate against certain types of speech depending on the speaker. In fact, in *One World*, when the court analyzed whether the ordinance was narrowly tailored, it reasoned that the ordinance was narrowly tailored because it addressed the government interests "without . . . significantly restricting a substantial quantity of speech that does not create the same evils." 76 F.3d at 1014 (citing *Ward*, 491 U.S. at 799 n.7). Here, defendants claim to be prohibiting the evil of commercial activity by prohibiting all soliciting of donations and sales by anyone not affiliated with a nonprofit. However, the nonprofit distinction significantly restricts a substantial quantity of speech — namely expressive speech by

> people who are not nonprofit members — that does not create the same evils as purely commercial activity on the boardwalk — which is what the government admittedly wants to restrict. Thus, applying the reasoning of *One World*, rather than merely looking to its result, one can see that the ordinance at issue here is not narrowly tailored to serve government interests.

Perry v. Los Angeles Police Department, 121 F.3d at 1371 [Petition, pp. 15a-16a].

Governmental authorities have often attempted to require potential solicitors to register with civic or law enforcement authorities before beginning their campaigns. Where registration processes appeared to be actually *licensing* programs giving undue discretion to the licensing officer(s), however, such registration processes have generally been declared unconstitutional. *Cantwell v. Connecticut*, 310 U.S. 296, 60 S. Ct. 900, 84 L. Ed. 1213 (1940); *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 757, 108 S. Ct. 2138, 100 L. Ed. 2d 771 (1988); *Shuttlesworth v. City of Birmingham*, 194 U.S. 147, 149, 150-151, 89 S. Ct. 935, 938-39, 22 L. Ed. 2d 162 (1969).

In essence, the ordinance struck down by the Ninth Circuit as overbroad impermissibly sought to license any and all First Amendment activity by requiring that the individual activist either "shut up" or become a member of a non-profit organization licensed by the City itself. This is necessary, the City argued, in order for it to be able to distinguish between "commercial" and "non-commercial" activities.

The City also argued to the Ninth Circuit that the non-profit license was so easy to obtain that even plaintiffs could do

it, but, as noted by the court, this argument contradicts the City's position that the licensing, and hence the distinction between non-profit organizations and individuals, is necessary to protect the governments' alleged interest in protecting against rampant commercial activities if absolutely anyone can obtain it.[3]. *Perry v. L.A.P.D.*, 121 P.3d at 1370, n.1. "A lack of non-profit status cannot reasonably be a predictor of purely commercial activity." *Id.*

Thus, the Ninth Circuit has properly stated and applied the relevant rules of law set forth by this Court, in a manner consistent with this Court's and the Ninth Circuit's other decisions in this area, and there is no reason for review on those grounds.

II.

AN ADVISORY OPINION TO THE CITY OF LOS ANGELES ON HOW TO DRAFT ITS ORDINANCES IS UNNECESSARY AND IMPROPER.

Finally, the City seeks to know "what law, if any . . . a city may establish in order to comply with constitutional freedom of speech requirements . . ." [Petition, p. 8], and "exactly what may and may not be banned and what must be allowed". [Petition, p. i]. This is a request for an advisory opinion. The actual case or controversy comprising the instant action is the constitutionality of the City's ordinance as it currently exists, not the constitutionality of all of the theoretical possibilities the City could or could not allow in its future anti-vending ordinances.

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3. Actually, the ordinance is vague as to what is required to be deemed a "non-profit organization", since an entity can be considered non-profit for federal tax purposes without being licensed by the City of Los Angeles, for example.

" 'The existence of judicial power under Art. III of the Constitution depends on the existence of a case or controversy,' and 'a federal court lacks the power to render advisory opinions.' (citations omitted)" *United States Nat'l Bank of Oregon v. Independent Insurance Agents of America, Inc.*, 508 U.S. 439, 446, 113 S. Ct. 2173, 2178, 124 L. Ed. 2d 402 (1993). Thus, the prohibition against advisory opinions is based in the Constitution, and this Court has always been loathe to render such advisory opinions, especially where, as here, to do so would blur the lines between the executive, legislative and judicial branches. *See Clinton v. Jones*, 117 S. Ct. 1636, 131 L. Ed. 2d 945 (1997) ("These restrictions on judicial activities 'help ensure the independence of the Judicial Branch and to prevent the Judiciary from encroaching into areas reserved for other branches.' (citations omitted)"); *See also Hudson v. United States*, 118 S. Ct. 488, 139 L. Ed. 2d 450 (1997). As this Court has stated:

> "No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal court jurisdiction to actual cases or controversies." (citations omitted)

Raines v. Byrd, 117 S. Ct. 2312, 138 L. Ed. 2d 849 1997 U.S. LEXIS 4040 *14 (1997).

Furthermore, to ask this Court to iterate "what law, if any . . . a City may establish in order to comply with constitutional freedom of speech requirements . . ." [Petition, p. 8] and "exactly what may and may not be banned and what must be allowed" [Petition, p. i] is to improperly ask this Court to decide additional constitutional questions not absolutely necessary to the decision in this case: "It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case." *Burton v. United States*, 196 U.S. 283,

295, 49 L. Ed. 482, 25 S. Ct. 243 (1905), *quoted in Hudson v. United States,* 118 S. Ct. 488, 139 L. Ed. 2d 450, 1997 U.S. LEXIS 7497 *34 (1997).

This Court is not a legislature, and is not in the position to unnecessarily advise the City in how to draft its ordinances to comply with established laws. What the City seeks in its request for review by this Court is an encyclopedic explanation of what it can and cannot allow in a public forum, *i.e.* an "owner's manual" or "laundry list" for drafting anti-peddling ordinances. The City's fundamental misconceptions about even the most basic First Amendment principles is evident throughout its petition, and drafting laws which withstand constitutional muster is surely never an easy task; however, the City's ignorance or inability to comprehend fundamental First Amendment principles is hardly cause for review on certiorari of a properly reasoned appellate court decision.

Indeed, instead of looking to this Could for advice on how to draft its ordinance, perhaps the City should look to the language of the preliminary injunction entered by the district court, which has been the basis for successful management of the Venice Boardwalk for nearly three years now. Incidentally, it should be noted that contrary to the City's representation in their Petition that without this Court's advisory opinion they will be forced to "go back to a total ban of sales and solicitations on the Boardwalk", [Petition, p. 15] such a "total ban" was *never* enforced against First Amendment activists, performers, artists, *etc.* on the Venice Boardwalk, but rather was only ever enforced against purely commercial activities such as the sale of soft drinks or shoes. After the current ordinance was enacted, however, even purely commercial activities such as the selling of hot dogs and Snapple brand drinks was allowed by the City, as long as it was being done by a non-profit organization.

The City of Los Angeles has simply failed to recognize, and continues to fail to recognize, that the distinction lies not in whether or not the "sale of wares" is "charitable", *id.*, but in whether the item being sold or given away is a protected, expressive item whose value is in the message, regardless of *who* is engaging in the protected speech.

> It should be remembered that the pamphlets of Thomas Paine were not distributed free of charge. . . . Freedom of speech, freedom of the press, freedom of religion *are available to all*, not merely to those who can pay their own way.

Murdock v. Pennsylvania, 319 U.S. 105, 111, 63 S. Ct. 870, 87 L. Ed. 1292 (1943) (Emphasis added). And, it should be noted, not merely to those who belong to non-profit organizations.

CONCLUSION

For all of the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JAMES H. FOSBINDER
Counsel of Record
RHONDA M. FOSBINDER
FOSBINDER & FOSBINDER
Attorneys for Respondents
723 Ocean Front Walk
Venice, California 90291
(310) 396-1071
(310) 285-3019